

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

TX 2005-050104

10/23/2006

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT  
S. Brown  
Deputy

ARIZONA STATE DEPARTMENT OF  
REVENUE

JOHN P THURAU

v.

MONARCH BREWERY L.L.C, et al.

JOHN A WEIL

**UNDER ADVISEMENT RULING**

Plaintiff's Request for Reconsideration of Denial of Motion for Summary Judgment has been under advisement.

Facts

The parties have substantially differing views of the material facts. The State alleges that Monarch Brewery, LLC owes some \$67,544.26 in unpaid transaction privilege taxes; that the Watsons were the sole members of the LLC; that Ian Watkinson was manager of the LLC, signed tax returns for the LLC and identified himself in filings related to bankruptcy proceedings as its "responsible party"; and that therefore the Watsons, as a marital community, are liable for the unpaid taxes under A.R.S. § 42-5028. Defendants assert that there were 39 members of the LLC, though conceding that Ian Watkinson held by far the largest share and was the appointed manager; that he was forbidden by the practice of the members to incur any obligation greater than \$5000; that, after the LLC filed for bankruptcy, the attorney and accountant for the debtor in possession had responsibility for payment of taxes; and that the liability is only that of Monarch Brewery and not of any of its officers.

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Personal liability under A.R.S. § 42-5028

A.R.S. § 42-5028 states, “A person who fails to remit any additional charge made to cover the tax or truthfully account for and pay over any such amount is, in addition to other penalties provided by law, personally liable for the total amount of the additional charge so made and not accounted for or paid over.” The analogous income tax statute, A.R.S. § 43-435, replaces the initial “a” with “any,” but is otherwise similar; the Court does not consider the word to have a difference in meaning in this context. The term “person” cannot only refer to the corporate entity. This would make the two sections mere surplusage, as the obligation of the taxpayer corporation to collect taxes and pay them over to the State is already established in Sections 42-5014 and 43-401 respectively. Such construction is disfavored. *Walker v. City of Scottsdale*, 163 Ariz. 206, 210 (App. 1989) (“each word, phrase, clause, and sentence must be given meaning so that no part of the statute will be void, inert, redundant, or trivial”).

It follows that the Court cannot embrace the reasoning of *In re Inselman*, 334 B.R. 267 (Bankr.D.Ariz. 2005), which held at page 271 that the absence of a statute expressly making certain human beings liable for failure to collect or pay taxes, along the lines of 26 U.S.C. § 6671(b), means that no human being can be held responsible. The Bankruptcy Court relied exclusively on *State v. Angelo*, 166 Ariz. 24 (App. 1990), in which the Court of Appeals reversed the criminal conviction of the president and secretary-treasurer of a corporation for failure to file transaction privilege tax returns on the corporation’s business. This reliance is misplaced. *Angelo* was a criminal case, in which, as the court held, “the statutes must clearly impose the duty to file a return upon an identified individual” and the statutory definitions must be “precise and definite.” *Id.* at 28. This due process defense was not available in *Inselman*, nor is it available to Defendant here. The *Angelo* court itself recognized that imposing liability for corporate taxes on parties other than the corporation itself could be acceptable in the context of civil tax liability, based upon the well-established power of the civil justice system to disregard the corporate form when recognition of it would work injustice. *Id.* at 27-28. The Court interprets the statute to create a joint obligation on both the corporate entity and the person(s) failing to remit, account for, or pay over the taxes, resulting in joint and several liability under A.R.S. § 44-101(A).

The person subject to Section 42-5028 was required to collect and pay transaction privilege taxes on all covered sales. The tax liability was incurred, not by any individual, but the LLC itself as a consequence of its corporate activity, and it became an obligation of the LLC *and of a person subject to the Section who failed to comply with its requirements* immediately upon consummation of the transaction. The statute does not expressly identify the person responsible, other than that the duty falls on “a person who fails to remit” the payments. This necessarily implies that the person have received control of the payments collected, and that he have the ability to pay the taxes over to the State. The statute does not limit the number of potential

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responsible persons to one: the language reads “a” or “any,” not “the.” *Purcell v. United States*, 1 F.3d 932, 937 (9<sup>th</sup> Cir. 1995), which interprets liability under federal tax statutes, thus goes beyond Arizona law in limiting the responsibility to the person who has the final word: as an example, a corporate treasurer charged with paying the business’s debts cannot escape liability by obeying the CEO’s order that taxes not be paid, regardless of whether the CEO thereby also becomes jointly and severally liable.

Here, it appears that Defendant Watkinson was able to pay the taxes. He was manager of Monarch Brewery. He signed the tax returns. He does not claim that he lacked access to the Monarch Brewery bank account. As discussed above, the \$5000 limit on the obligations he was empowered to incur does not apply here, as the obligation to pay over transaction privilege taxes was incurred by Monarch Brewery in the course of its operations, not by him. As the action in Bankruptcy Court was dismissed, the tax obligation was not extinguished; whether or not Monarch Brewery could have made payments while the case was pending, or immediately before the bankruptcy filing, does not affect its or his liability today. The only question of fact remaining is whether Defendant Watkinson or any other person (majority in interest) asserted or assumed responsibility to pay Monarch Brewery’s transaction privilege taxes. Therefore, IT IS ORDERED on that ground only, the State’s Motion for Reconsideration is denied.

IT IS FURTHER ORDERED in all other respects the State’s Motion for Reconsideration is granted consistent with this minute entry ruling.